

(1) After both the claimant's and the respondent's terminal dates had elapsed and the case was submitted for decision to the Administrative Law Judge, claimant, on

February 25, 1994, filed another submission letter. Attached to this submission letter was an affidavit dated December 23, 1993 containing additional testimony of the claimant. The affidavit stated that the respondent had terminated claimant's employment November 8, 1993.

The Administrative Law Judge did not list the affidavit as part of the evidentiary record, nor did he refer to the affidavit in his findings contained in the Award. Claimant argues that this affidavit should be included in the evidentiary record that is before the Appeals Board and should be considered by the Appeals Board upon review of the Award of the Administrative Law Judge. Claimant contends that the issue of the nature and extent of claimant's disability should be based on claimant's testimony contained in the affidavit which proves that the claimant is no longer employed by the respondent as of November 8, 1993.

Respondent objects to the admission of the affidavit and, further, counters claimant's argument by asserting that the Appeals Board cannot include the affidavit in the evidentiary record on review because the Appeals Board is only authorized to review the evidentiary record considered by the Administrative Law Judge. The Appeals Board finds that it has exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of Administrative Law Judges. However, such review is limited to questions of law and fact as provided and shown by the transcript of evidence as presented and introduced before the Administrative Law Judge. See K.S.A. 1995 Supp. 44-555c(a). Claimant attempted to introduce the affidavit before the Administrative Law Judge by simply sending it to the Administrative Law Judge attached to a second submission letter. However, the Administrative Law Judge apparently did not include the affidavit as part of the evidentiary record that was before him and did not consider it as evidence in deciding the Award. Accordingly, the Appeals Board finds, absent an agreement of the parties, it cannot include claimant's affidavit as part of the evidentiary record on appeal because the affidavit was not part of the record before the Administrative Law Judge.

(2) The Administrative Law Judge limited claimant's permanent partial general disability benefits to a 3 percent impairment of function to the body as whole. Claimant argues that she is entitled to a larger work disability. Claimant concludes that permanent work restrictions were placed on her after her work-related injury restricting her from working overtime and, therefore, she has a loss in her ability to earn a comparable wage. On the other hand, respondent asserts that claimant has been returned to work earning more than she was on the date of her injury. The Appeals Board finds that the wage statement, marked Exhibit No. 7, contained in vocational consultant Jerry Hardin's deposition dated July 29, 1993, shows claimant's preinjury average weekly wage to be \$626.41. Karen Terrill, vocational expert, testified on behalf of the respondent and established that claimant was earning \$15.72 per hour, working 40 hours per week, while working for the respondent as of August 12, 1993. Accordingly, the Appeals Board finds claimant's postinjury average weekly wage to be in the amount of \$628.80. Comparing claimant's preinjury weekly wage of \$626.41 with her postinjury weekly wage of \$628.80, the Appeals Board finds that as a result of claimant's work-related injury she did not lose any of her ability to earn a comparable wage. Therefore, the presumption of no work disability applies to this case and the claimant is, therefore, limited to her percentage of functional impairment. See K.S.A. 1990 Supp. 44-510e(a). The Administrative Law Judge's Award entitling claimant to a 3 percent permanent partial general disability is affirmed by the Appeals Board.

All other findings and conclusions contained in the Award of the Administrative Law Judge dated June 10, 1994 that are not inconsistent with the findings set forth in this Order are incorporated herein and adopted by the Appeals Board.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark, dated June 10, 1994, should be, and the same is hereby, affirmed as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Bonita Wynn, and against the respondent, Boeing Military Airplanes, and its insurance carrier, Aetna Casualty and Surety, for an accidental injury which occurred May 18, 1991 and based upon a stipulated average weekly wage of \$739.95.

Claimant is entitled to 14.86 weeks of temporary total disability compensation at the rate of \$278.00 per week or \$4,131.08, followed by 400.14 weeks of permanent partial general disability at the rate of \$14.80 per week or \$5,922.07 for a 3% permanent partial general body disability, making a total award of \$10,053.15.

As of March 15, 1996, there is due and owing claimant 14.86 weeks of temporary total disability compensation at the rate of \$278.00 per week or \$4,131.08, followed by 237 weeks of permanent partial disability compensation at the rate of \$14.80 per week in the sum of \$3,507.60, for a total of \$7,638.68 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$2,414.47 is to be paid for 163.14 weeks at the rate of \$14.80 per week, until fully paid or further order of the Director.

The claimant is entitled to unauthorized medical up to the statutory maximum of \$350.00 upon proper presentation of expenses. Future medical benefits are to be awarded only upon application to and approval by the Director.

Fees necessary to defray the expense of administration of the Workers Compensation Act are hereby assessed against the respondent to be directly paid as follows:

Deposition Services	
Deposition of Robert L. Eyster, M.D.	\$105.30
Deposition of Karen Crist Terrill	\$233.60
Barbara Terrell & Assoc.	
Deposition of Jerry D. Hardin, M.S.	\$101.50
Don K. Smith & Assoc.	
Deposition of Ernest R. Schlachter, M.D.	\$101.50
Barber & Associates	
Transcript of Regular Hearing	\$95.50

IT IS SO ORDERED

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The June 10, 1994 Award by Administrative Law Judge John D. Clark lists the stipulations of the parties. Stipulation No. 9 in that Award reads: "Average weekly wage is \$739.95." Neither party raised average weekly wage as an issue to the Administrative Law Judge, nor was it made an issue before the Appeals Board. In their Order, the majority specifically adopt the stipulations as entered by the Administrative Law Judge. Nevertheless, they go on to determine the claimant's average weekly wage. I would not treat average weekly wage as an issue but, instead, would accept the stipulation of the parties.

The majority find claimant's average weekly wage to be \$626.41 based upon the wage statement introduced at the July 29, 1993 deposition of Jerry Hardin. However, on March 1, 1994, after the date of Mr. Hardin's deposition, the parties stipulated that the average weekly wage is \$739.95. The majority's award is calculated based upon this stipulated average weekly wage of \$739.95. I agree with the majority that it is proper to use the stipulated average weekly wage for purposes of calculating benefits. However, where I disagree with the majority is with their not using that same stipulated average weekly wage to determine whether the employee is engaging in work for wages comparable to the average gross weekly wage that she was earning at the time of the injury. I would use the same average weekly wage for both the computation of benefits and the determination as to the applicability of the presumption contained in K.S.A. 1990 Supp. 44-510e(a). For the same reason the majority uses the stipulated average weekly wage to calculate the award, it must use the stipulated average weekly wage to determine whether claimant is entitled to a work disability award. The majority apply the presumption contained in K.S.A. 1990 Supp. 44-510e(a) because they find the average weekly wage of \$626.41 to be comparable to the average weekly wage she earned postinjury. However, if the stipulated average weekly wage of \$739.95 is used for comparison with claimant's postinjury earnings, then the presumption would not be applicable. Thus, if the stipulated average weekly wage were utilized, then a work disability in excess of the functional rating would be appropriate.

BOARD MEMBER

c: Broc E. Whitehead, Wichita, KS
Frederick L. Haag, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director